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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Your Petitioner, A. N. Cone, respectfully asks this Honorable Court to review on Writ of Certiorari, a judgment of the United States Circuit Court of Appeals, Fourth Circuit, in the case of *West Virginia Pulp and Paper Company* v. *A. N. Cone,* rendered February 7, 1946, as is shown by a true copy of the record herein filed (R. 203). Mandate of the said United States Circuit Court of Appeals, Fourth Circuit, having been dated and filed March 15, 1946 (R. 215), and judgment of the United States District Court for the Eastern District of South Carolina, Charleston Division, pursuant to said mandate, having been dated and filed April 1, 1946.

The matter involved and the reasons relied upon by the Petitioner for the allowance of the Writ are:

The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. This was an action of trespass *quare clausum fregit*, commenced by A. N. Cone in the Court of Common Pleas for Colleton County, in October, 1944, and removed by the defendant, West Virginia Pulp and Paper Company to the U. S. District Court for the Eastern District of South Carolina, Charleston Division. Plaintiff claimed under deed and plat from his mother in 1920, clearly defining the close and that he had been paying taxes thereon for more than twenty years, and had enjoyed peaceable possession (see amended Complaint (R. 1)). The defendant entered a general denial.

Trial by jury was held before the Honorable J. Waties Waring, District Judge and a jury at Charleston, South Carolina, at the May Term, 1945.

At trial, plaintiff introduced plat of his grandfather, dated 15 January, 1847 (R. 100); deed from his grandfather, Adam Miles Cone to his father, Miles Cone, dated September 19, 1888 (R. 97); deed from plaintiff's mother to plaintiff, together with plat dated 16 August, 1920 (R. 70-73); certified copy of tax records showing the payment of taxes on the disputed land by his father and mother from 1915 to 1921, and by the plaintiff from 1921 through 1944 (R. 74-75). Plaintiff did not introduce any deed from the father to the mother, but testified that the mother, father and grandfather were in possession of the land (R. 13-14).

The defendant, West Virginia Pulp and Paper Company introduced a deed dated April 5, 1924 (R. 78), and composite plat for some ten thousand acres (R. 77), of adjoining lands, under which plat defendant claimed the disputed property as a part thereof. Defendant further introduced chain of

title to the adjoining lands concerning which there was no dispute.

Plaintiff introduced undisputed testimony that the lands in controversy were not a part of the chain of title claimed by the defendant (R. 155-159). Plaintiff also introduced evidence that the defendant had not paid any taxes on lands claimed by it from 1925 to 1935, and had not paid taxes on the disputed lands from 1936 through 1944; the tracts acquired by defendant allegedly contained Five Hundred Eight (508) acres, and it paid taxes thereon from 1936 to 1944; but its survey of 1924 showed Eight Hundred Sixty Eight (868) acres in order to take in the disputed land adjoining its holdings (R. 177). Plaintiff further introduced evidence of the Sheriff of Dorchester County, South Carolina, that the defendant in 1942 one year after the alleged trespass, attempted to purchase the plaintiff's claim of title and possession at a sale of the lands in dispute for taxes assessed against plaintiff (R. 159, 160, 161 and 179).

It was admitted that the lands were wild, uncultivated, unfenced and uninhabited swamp land, fit only for the growing of timber.

The jury returned verdict for the plaintiff in the amount of Fifteen Thousand ($15,000.00) Dollars, and judgment was entered by the District Court, June 5, 1945. The defendant appealed and the United States Circuit Court of Appeals, Fourth Circuit, in its opinion dated February 7, 1946, reversed the verdict of the lower Court and issued a mandate entering judgment for the defendant (R. 189, 203, 215). The plaintiff, A. N. Cone, petitioned for a rehearing (R. 205-213), and Order denying rehearing was entered on March 15, 1946 (R. 215).

Your Petitioner earnestly prays that a Writ of Certiorari should be granted by this Court to review and reverse the judgment of the U. S. Circuit Court of Appeals, Fourth

Circuit, because said Circuit Court of Appeals, Fourth Circuit (contrary to the applicable local decisions), erred in holding as follows:

(a) That in an action of trespass *quare clausum fregit* the burden of proof to show *perfect* title lies upon the plaintiff.

(b) That in an action of trespass *quare clausum fregit* the burden lies upon the plaintiff to show actual physical possession (*pedis possessio*).

(c) That in an action of trespass *quare clausum fregit*, if title by adverse possession is relied upon, the burden lies upon the plaintiff to show occupancy of the land in *pedis possessio* on every day of the statutory period.

(d) That in an action of trespass *quare clausum fregit*, where the plaintiff relies on adverse possession, that the payment of taxes by the plaintiff for the statutory period is not of probative force as to proof of possessory title.

(e) That in an action of trespass *quare clausum fregit*, where the plaintiff relied on adverse possession, testimony of the possession of the plaintiff's mother and father and grandfather are inadmissible and prejudicial to the defendant.

II

Your Petitioner earnestly prays that a Writ of Certiorari should be granted by this Court to review and reverse the judgment of the Circuit Court of Appeals, Fourth Circuit, because the said Court has decided an important question of Federal Law which has not been, but should be settled by this Court,

The defendant, West Virginia Pulp and Paper Company, moved for a directed verdict, which was denied, but did not move for judgment notwithstanding the verdict (*non ob-*

stante verdicto). The Circuit Court of Appeals, Fourth Circuit, in setting aside the verdict and judgment, and entering judgment for the defendant, took upon itself the authority to enter judgment for the defendant on grounds not set forth in the motion for directed verdict, and in conflict with the evidence and verdict.

The Court bases its authority for such action under Rule 50 B of the Federal Rules of Civil Procedure, and *United States* v. *Halliday,* (116 F 2d 812). The Petitioner respectfully submits that the decisions of this Court and the said Rule do not permit the entering of judgment for the defendant on grounds not set forth in motion for directed verdict, and contrary to the evidence and verdict of the jury.

Your Petitioner respectfully submits that when the Circuit Court found that evidence had been erroneously admitted in the Court below (though this error is denied), it should have sent the case back for a new trial. However, in gratuitously entering judgment for the defendant, without the clear authority to do so, it denied the plaintiff, A. N. Cone, any forum to hear his just complaint which a verdict of twelve jurors had decided in his favor under proper rules of procedure. It might also be pointed out that the entry of judgment for the defendant, through the medium of *res adjudicata,* forever declared title to the disputed lands in the defendant, and the Court of Appeals decision does not even intimate title in the defendant.

III

Your Petitioner earnestly prays that a Writ of Certiorari should be granted by this Court and reverse the judgment of the Circuit Court of Appeals, Fourth Circuit, because the said Court has rendered a decision probably in conflict with applicable decisions of this Court and other Circuit Courts of Appeal. The Circuit Court of Appeals was

bound under the decisions of this Court and other Circuit Courts to view the evidence in the light most favorable to the verdict; to resolve inferences from the testimony in favor of the verdict and against the defendant, and was without authority to reweigh the evidence.

IV.

Your Petitioner earnestly prays that a Writ of Certiorari should be granted by this Court to review and reverse the judgment of the Circuit Court of Appeals, Fourth Circuit, because the decision of the said Court is directly in conflict with the provisions and requirements of Rule 61 of the Federal Rules of Civil Procedure. This Rule prohibits the setting aside of any verdict, or the vacating of any judgment, unless so doing is consistent with substantial justice. Your Petitioner respectfully submits that the Court's action in gratuitously entering judgment for the defendant, instead of sending the case back for a new trial, where the grounds for entering judgment were not set forth or reserved by the defendant in a motion for directed verdict is inconsistent with substantial justice because it confirms superior title in the defendant to the land in dispute, whereas a close analysis of the Court's opinion shows that the said Court never intimated that the said defendant had title to the land because the evidence was uncontradicted that the lands were not a part of the chain of title under which the defendant claimed. Your Petitioner respectfully submits that this is a gross miscarriage of justice, and that he has no house of refuge or protecting arm to right this wrong other than the issuance of a Writ of Certiorari by this Honorable Court.

WHEREFORE, for the foregoing reasons, and because the said decision of the Circuit Court of Appeals, Fourth Circuit, has decided an important question of local law in a

way probably in conflict with applicable local decisions, and has decided important questions of Federal Law which have not been, but should be settled by this Court, and is in conflict with the decisions of this Court and other Circuit Courts of Appeal, your Petitioner prays that a Writ of Certiorari be issued to the United States District Court for the Eastern District of South Carolina, Charleston Division, where the mandate of the United States Court of Appeals, Fourth Circuit, is now filed, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that upon review, that the said judgment and mandate of the circuit Court of Appeals, Fourth Circuit, be ordered reversed and the verdict and judgment of the jury and Circuit Court, in favor of the plaintiff, be restored.

Respectfully submitted,

A. N. CONE,
Petitioner,
By W. J. McLEOD, JR.,
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Walterboro, South Carolina;
J. P. MOZINGO,
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Walterboro, South Carolina,

May 27, 1946.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

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BRIEF FOR PETITIONER

Official Report

The decision of the Circuit Court of Appeals, Fourth Circuit is shown in the record at page R. 189, and is reported 153 F. (2d) page 576.

Statement of Grounds of Jurisdiction

The judgment sought to be reviewed herein was filed by the District Court of the United States for the Eastern District of South Carolina, Charleston Division, on April 1, 1946, pursuant to mandate of the United States Circuit Court of Appeals, Fourth Circuit, February 7, 1946, in which case Petition of the plaintiff, A. N. Cone, for rehearing was denied by the United States Circuit Court of Ap-

peals, Fourth Circuit, by Order filed March 15, 1946, the said Petition for Rehearing having been timely filed.

Jurisdiction of this Court is invoked under Section 347, U. S. C. A., Title 28, Chapter 9, and the revised rules of the Supreme Court of the United States, Rule 38 as set forth in U. S. C. A. 28, and cases therein cited.

As set out in the Petition, this Court has jurisdiction by certiorari to review the failure of United States Appellate Courts to follow the laws as laid down by the Supreme Court of the State of South Carolina affecting land titles.

Beauregard v. *City of New Orleans*, 59 U. S. 497, 15 Law Ed. 469;

White v. *Burnley*, 61 U. S. 235, 15 Law Ed. 886;

Walker v. *State Harbor Commissioners*, 84 U. S. 648, 21 Law Ed. 744;

Suydam v. *Williamson*, 65 U. S. 427, 16 Law Ed. 742.

The Court further has jurisdiction to review decisions of the Circuit Courts of Appeal where that Court has reweighed the evidence and made its own findings contrary to the Rule of this Court, that the general verdict rendered in favor of the Petitioner, A. N. Cone is conclusive as to questions of title, unless there is no evidence to sustain it and this Court has granted certiorari in such a case.

McCaughn v. *Real Estate Land Title and Trust Company*, certiorari granted 56 Supreme Court, 442, 297, U. S. 679, 80 Law Ed. 988.

This Court has further jurisdiction to review the decision of the Court of Appeals because the said Court had no right to deprive the plaintiff of trial by jury, by entering judgment for defendant after verdict for the plaintiff. This Court has granted certiorari in such a case.

Aetna Ins. Company v. *Kennedy*, certiorari granted 57 Supreme Court, 670, 300 U. S. 651. Case reported 57 Supreme Court 809, 301 U. S. 389.

This Court also has jurisdiction to review the decisions of the Court of Appeals rendered contrary to the Federal Rules of Civil Procedure promulgated by this Court.

Statement of Case

All of the relevant facts, the Petitioner believes, are set out in the Petition herein and will be stated in the body of this brief only in so far as will be necessary in the discussion of the questions involved.

Argument

I

The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

(a) This was an action of trespass *quare clausum fregit*, commenced in the Court of Common Pleas for Colleton County, South Carolina, by the plaintiff, A. N. Cone, and removed to the United States District Court for the Eastern District of South Carolina, at Charleston, South Carolina, by the defendant, and was tried by the Honorable J. Waties Waring and a jury, at the May Term, 1945.

The plaintiff introduced deed and plat, conveying the land in dispute to him by his mother, Caroline J. Cone, dated 16 August 1920, and clearly defining the close on said plat, (R. 71-73); plaintiff further introduced certified copy of tax records showing payment of taxes on the said land by him from 1921 through 1944, (R. 74-75); plaintiff further testified that he entered upon the said land under said deed, and cut wood and clapboards and hunted the property from time to time for more than twenty years, (R. 3-27); plaintiff's witnesses further testified that they had hunted the land by his permission and that it was known as Cone Land

in the neighborhood and by adjoining land owners, (Testimony of Julia Annoe Driggers (R. 159), John D. Harrison, (R. 155), Robert Williams, (R. 157), Frank Green, (R. 158).

Macedonia Baptist Church v. *City of Columbia*, 10 S. E. 2d, 350, 195 S. C. 59. The Court therein stated:

> "This is not an action to try title. It is one to recover damages for trespass to the property of which the plaintiff was in possession. The deed which plaintiff produced was sufficient to show that the Church was in lawful possession of the property."

The Circuit Court of Appeals held that the plaintiff might do this by "Proof either of actual physical possession, the *pedis possessio*, or by proof of a perfect legal title, from which constructive possession is presumed." (153 F. 2d, page 578).

The correct Rule under South Carolina Supreme Court Decisions is as follows:

> "The important question is thus raised whether plaintiff alleging both title and possession, is entitled to recover damages upon proof of his possession and the invasion of it by the defendant, *without proving also that he has perfect title.* The question must be answered in the affirmative. One person who finds another in possession of the land can not, by seizing the possession or invading it, put him whose possession he seized or invaded to proof of his title. In such a case possession is prima facie evidence of title, and he who invades must establish his title. If this were not so, a holder of land could be put to proof of title against the world by anyone who might choose to trespass or squat upon his lands. This conclusion is well supported by authority. Couch v. Burke, 2 Hill Law 534. Connor v. Johnson, 59 S. C. 115, 37 S. E. 240."
>
> *Beaufort Land and Investment Co.* v. *New River Lumber Co.*, 68 S. E. 637, page 638, 86 S. C. 358.

"This was error because this was an action of trespass *quare clausum fregit* in which form of action it was not legally incumbent upon the plaintiff to recover on the strength of its title, but it was sufficient to make out plaintiff's case by merely showing possession on the part of the plaintiff."

Santee River Cypress Lumber Co. v. *Elliott, et al.*, 150 S. E. 683, page 691, 153 S. C. 179.

(b) The Court of appeals having fallen into error on the burden of proof of the plaintiff to show perfect title as above set forth, erroneously concluded that if no perfect paper title was shown, then the plaintiff must show actual physical possession of the land in order to prove title by adverse possession. Under the *Macedonia* case (*supra*), the introduction of the plaintiff's deed recorded some twenty-one years prior to the alleged trespass, clearly defining the close by plat, was proof of plaintiff's constructive possession for more than the statutory period. Since the land was admittedly uncultivated, uninhabited, swamp land, fit only for the growing of timber, it can not be said that the plaintiff was forced to live on the land to be in actual physical possession of it (*pedis possessio*). The correct Rule, as stated by the South Carolina Supreme Court, is as follows:

"The possession of the Bardins was adverse and continuous for more than twenty years; and while the land in question was not cultivated or inclosed, it was used for the supply of fuel and timber, the ordinary uses for which such land was fitted. Code Civ. Proc. 1902, paragraph 103. The payment of taxes on the land for a number of years by the Bardins was also some evidence to be submitted to the jury on the ground whether the state had parted with title."

Bardin, et al., v. *Commercial Insurance and Trust Co.*, 64 S. E. 165, 82 S. C. 358.

D. W. Alderman and Sons v. *McKnight*, 95 S. C. 245, 78 S. E. 982.

(c) The Circuit Court, having erroneously concluded that if the plaintiff did not show perfect paper title, he must show actual physical possession, *(pedis possessio)*, further erroneously held that if the plaintiff relied on title by adverse possession he must show actual physical occupancy of the land on every day of the statutory period.

The testimony of the plaintiff that he entered upon the land, hunted and cut wood thereon is undisputed and is sufficient entry under his deed to start the claim of possession. The general rule is stated as follows:

> "It has been well said that the pursuit of game, the occasional cutting of trees or the gathering of herbage or wild fruits, and the like, furnish no presumption that the entry has been made for the purpose of taking possession, *although it is otherwise where one enters under a deed which defines his claim.* 52 Am. Jur. Section 28, page 857.

The Court of Appeals in its opinion, in holding that the plaintiff, in order to prove title by adverse possession, must actually occupy the land in *pedis possessio* for every day of the statutory period, cites the case of *Cathcart* v. *Matthews*, 105 S. C. 329, 39 S. E. 121. Whereas, the South Carolina Supreme Court, in the said case, actually laid down the correct S. C. Rule, as later quoted in *Gore, et al,* v. *Whiteville Lumber Company*, 96 S. E. 683, page 684, 110 S. C. 474, as follows:

> "In Cathcart v. Matthews, it was pointed out as had been held before, that possession, actual or constructive, is sufficient to maintain an action of trespass quare clausum fregit, and further that, even in a claim of adverse possession, the rule requiring continuity of possession does not mean that the person in possession, his agent or tenant, must be actually on that land during the whole of the statutory period, but the actual possession, once taken, will continue, though the party

taking such possession should not continue to rest with his foot upon the soil until he be disseized or do some act amounting to an abandonment of the possession. We may add that, in determining the question of possession, the character of the land is entitled to due consideration, for according to its nature the acts and facts which constitute possession may vary. Naturally, they are different in the case of woodland or swamp, or lands covered by water, from what they are when it is cultivated or susceptible of actual use and occupancy."

(d) The Court further erred in holding that the plaintiff's payment of taxes on the disputed land for more than twenty years was without probative force as to proof of possessory title. The Court of Appeals, in its opinion, stated:

"The fact the plaintiff paid taxes on the land and that his father gave someone else permission to hunt on the land are matters whose sole probative force is directed to plaintiff's title, not to his possession, so that these may be rejected here."

Section 2605 of the Code of Laws of 1942, for South Carolina, provides:

"That all lands shall be listed and assessed as the property of the person or persons having the legal title to and the right to possession of—."

The Supreme Court of South Carolina, in construing the effect of this statutory provision has held such testimony to be of probative force in proof of adverse possession. That Court has said:

"When we come to the return for taxation being made in the name of James Stuart, it seems to me we have a very strong circumstance to support his claim. —I find it sufficient proof of adverse possession and of a grant—."

Campbell v. *Stuart, et al.*, 84 S. E. 415.

It might be stated at this point that the Court probably fell into this error because it was faced with the fact that the defendant did not pay taxes on any land in the School District in which the disputed land lies from 1924 to 1935, (R. 177-178), and probably did not pay any taxes on the disputed lands from 1936 to 1944, (the tract of land conveyed to the defendant being composed of Five Hundred Eight (508) acres and claimed to be included in said tract by the defendant by virtue of a survey in 1924 showing the acreage to be Eight Hundred Sixty Eight (868) acres, and the boundaries including the disputed property). The defendant's witness, although testifying that the defendant paid taxes from 1924 to 1935, inclusive, on cross examination admitted that the bundle of receipts exhibited to the Court and jury as tax receipts of the defendant were in reality tax receipts of some other corporation which never held title to the land (appellee's appendix R. 13, page 51).

The Court of Appeals fell so far into error, and showed its unfamiliarity with the provisions and effect of the land tax system of South Carolina and in reweighing this evidence, stated:

> "It is most unfortunate that the system of keeping the land records for taxation in this region was such that it is almost entirely impossible to determine with any measure of certainty, just what parcel or parcels of land were covered by a particular tax payment. The inadequacy of this system also accounts for the otherwise curious fact that the state would accept, without inquiry, an unlimited number of duplicate payments of taxes by different parties, on the same tract of land for the same year. In such a state of the records, it does not appear that material reliance by either party upon payment of taxes is really justifiable." (153 F. 2d, page 580.)

Your Petitioner respectfully submits that this is an unwarranted attack upon the taxation system of the Sovereign

State of South Carolina; that the above quoted provision of the South Carolina law for the return and assessment of land is clear and simple and that the testimony of the defendant does not warrant an assumption of duplicate payments or the allegation of "inadequacy of this system".

(e) The Court of Appeals held that the oral testimony of the plaintiff and his witnesses, that prior to the execution of the deed from his mother to him in 1920, his mother was in possession of the property, and that prior to his mother his father was in possession of the property under deed from his grandfather, and that his grandfather was in possession before deed to his father, since before the Civil War, was prejudicial error and was inadmissible. The plaintiff's possession under title from his mother, existed for more than twenty years and was sufficient in itself to establish adverse possession as above argued. It certainly could not have been prejudicial to the defendant to permit the oral testimony as to the possession of his mother, father and grandfather. This is most especially true since possession of the plaintiff, his mother, his father and grandfather was shown by other evidence, such as payment of taxes, knowledge of the community and adjoining landowners that the disputed land was Cone Land.

> "In an action involving the question of adverse possession of land, testimony of witnesses as to the actual possession of the land is admissible; but actual possession cannot be shown by the payment of taxes, by a deed describing the land or an invalid grant by the State or by evidence that the land was known in the community to belong to the adverse claimant and neither are declarations of the adverse claimant that the property was his admissible to prove the possession, *although it may be competent proof of possession otherwise shown*." 2 C. J. S. Section 221, pages 827, 828.

II

The Court of Appeals has decided an important question of Federal law which has not been, but should be settled by this Court. At the conclusion of the testimony, the defendant moved for a directed verdict on the grounds "the proof deduced by the defendant, we feel, substantiates title conclusively in this land in the defendant and not in the plaintiff, as he attempted to show" (R. 58). The grounds for directed verdict moved by the defendant were not based on superior possession of the defendant, but on superior title. After verdict for the plaintiff and judgment thereon in the amount of Fifteen Thousand ($15,000.00) Dollars, the defendant made no motion, notwithstanding the verdict. When the defendant appealed, nowhere in its brief did it request judgment be entered on its behalf on the grounds that it had shown under all the evidence, superior possession.

A close analysis of the opinion of the Court of Appeals fails to reveal any intimation by that Court that the defendant proved superior title. As a matter of fact, the evidence is uncontradicted that the disputed land was not a part of the chain of title under which the defendant claimed. Testimony of John D. Harrison (R. 155), Robert Williams (R. 157), Frank Green (R. 158).

The Appellate Court evidently bases its reversal of the verdict and judgment for the plaintiff, and entry of judgment for the defendant, upon the grounds that the defendant had proved superior possession, after reweighing the evidence, although the grounds upon which verdict and judgment was reversed is singularly hidden.

> "Since the defendant has also undertaken to show its own actual possession, it is in order to consider the legal status of two conflicting claims of possession at the same time." (153 F. 2d, page 58[illegible].)

The Appellate Court cites as its authority to reverse verdict of jury and judgment of the Circuit Court and to enter judgment for the defendant, the case of the *United States* v. *Halliday*, 116 F. 2d, 812, and Rule 50B of the Federal Rules of Civil Procedure. Neither this case nor the said Rule, or any case cited under said Rule, have ever held that the Appellate Court had the power to reverse verdict and judgment and enter judgment for the defendant where the grounds for reversal are different from the grounds laid by the defendant in a motion for a directed verdict, without subsequently moving for judgment, notwithstanding the verdict.

Your Petitioner respectfully submits that this Federal question should be decided by this Honorable Court, and respectfully submits that the Rule should properly be that the Appellate Courts are without such authority, since the reason for permitting any power in the Appellate Court to reverse and enter judgment for the defendant is based upon the legal implication of Rule 50B of Rules of Federal Procedure that all legal rulings of the District Courts on grounds for motion for directed verdict are reserved by said Rule in the Appellate Court. Obviously, where the grounds are not reserved, the Appellate Court can not supply such grounds of its own volition. This is most especially true where, as in this case, the grounds for reversal were based on superior possession in the defendant under conflicting testimony, which issue was decided by the verdict of the jury.

III

Your Petitioner respectfully submits that the decision of the Appellate Court in this case is probably in conflict with applicable decisions of this Court and other Circuit Courts of Appeal.

The Court was bound under the decisions of this Court, and other Courts of Appeal, to view the evidence in the light most favorable to the verdict, and to draw all inferences or conclusions from the evidence in favor of the jury's verdict, and the Appellate Court was without authority to reweigh the evidence and set aside the verdict merely because a jury could have drawn other inferences or conclusions.

Cole v. *Chicago St. P. M. & O. R. R. Co.*, 59 Fed. Supp. 443;

Boston and Marr v. *Cabana*, 148 F. (2d) 150;

McCaughn v. *Real Estate Land Title and Trust Co.*, 56 Sup. Ct. 604, 297 U. S. 606, 80 L. Ed. 879.

Although there was conflicting evidence of the same type possession by the plaintiff and by the defendant in the record, the jury rendered a verdict in favor of the plaintiff. The Appellate Court, in its opinion, stated:

> "It might be contended that the jury's verdict for the plaintiff has established such possession, but such is not the case where improper evidence was before the jury as to plaintiff's title, so that the general verdict might just as well have been based upon the jury's conception that plaintiff had title as that he had possession."

This inference should have been resolved in favor of the verdict which should have caused the Court of Appeals to hold that the verdict was based on possession in the plaintiff.

The Appellate Court, in its opinion, further concluded that the plaintiff, upon learning of the trespass, "made no open protest or complaint of any kind, variety or description," whereas the record shows that the plaintiff imme-

diately employed counsel to repreesnt him (R. 18-19). Your Petitioner respectfully submits that such evidence should have been construed in favor of the plaintiff and in afvor of the verdict since it is in the interest of the orderly administration of justice that laymen should employ counsel to take the necessary legal steps to prevent trespasses, rather than to provoke breaches of the peace.

The testimony is undisputed that, over a year after the alleged tresepass complained of, the defendant attempted to purchase the plaintiff's claim to the land at a sale by the Sheriff of Dorchester County, South Carolina, for taxes on the said land assessed in the name of the plaintiff (R. 159, 161, 179). This inference from the testimony that the defendant admitted plaintiff's claim of title and possession, and attempted to validate the trespass by purchase of the plaintiff's claim, was ignored by the Appellate Court and should have been viewed in the light most favorable to the plaintiff and to the verdict.

The Appellate Court, in its opinion, further stated:

> "In this connection, it may be noted that plaintiff's deed from his mother, contrary to almost universal practice, makes no mention whatsoever of the source of the grantor's title."

The Court construed this as an inference of the evidence against the plaintiff and against the verdict by reasoning that the absence of such a recital indicated there was no source of title into the mother, whereas such inference should have been resolved to the contrary. Despite the fact that no such evidence appears in the record, that such is the universeal practice in South Carolina, ample proof can be exhibited that such is not the universal practice in land matters in South Carolina.

IV

The decision of the Appellate Court is directly in conflict with the provisions and requirements of Rule 61 of the Federal Rules of Civil Procedure. Said Rule provides as follows:

> *Rule 61. Harmless Error.* No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The Court's action in entering judgment for the defendant, despite the fact that the grounds for such action were not laid or reserved under a motion for directed verdict, and that no motion *non obstante veredicto* was made, and despite the fact that the opinion does not intimate superior title in the defendant, the entry of judgment for the defendant through the medium of *res adjudicata*, confirms title in the defendant. This is contrary to the undisputed evidence and contrary to the verdict and denies the plaintiff of his right to trial by jury.

> *Aetna Ins. Company* v. *Kennedy*, 57 Sup. Ct. 809, 301 U. S. 389, 81 L. Ed. 1177, certiorari granted 57 Sup. Ct. 670, 300 U. S. 651.

Your petitioner submits that such action is not consistent with substantial justice.

WHEREFORE, your Petitioner respectfully submits that the opinion and mandate of the Circuit Court of Appeals,

Fourth Circuit, entering judgment for the defendant, should be reviewed and reversed.

A. N. CONE,
Petitioner;
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May 27, 1946.